STATE OF IDAHO)
County of KOOTENAI) ss

FILED_____

AT _____ O'clock ___ M
CLERK, DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

REGINALD JAMES IVIE
DOB: 06/08/1978
SSN: XXX-XX-1786
IDOC: 118371

Defendant.

Case No. **CRF 2015 10396**

MEMORANDUM DECISION AND ORDER DENYING I.C.R. 35 MOTION AND NOTICE OF RIGHT TO APPEAL

I. INTRODUCTION AND PROCEDURAL HISTORY.

On February 11, 2016, REGINALD JAMES IVIE was sentenced as follows:

LEWD CONDUCT WITH A MINOR	To the custody of the State of Idaho Board of Correction for a fixed term of SEVEN (7) years followed by an indeterminate term of LIFE years for a total unified sentence of LIFE years.

Sentencing Disposition and Notice of Right to Appeal 1-2. On February 11, 2016, this Court imposed that prison sentence.

One hundred and eighteen days later, on June 8, 2016, Ivie filed the instant Motion for Reconsideration of Sentence Pursuant to I.C.R. 35 (Rule. 35 Motion) requesting that "the Court to reconsider the Judgment and Sentence entered herein." Rule 35 Motion, 1. Ivie also filed a Memorandum in Support of Idaho Criminal Rule 35 Motion. At the time of filing these motions, Ivie was now represented by attorney Monica Flood Brennan, who

was not the attorney that handled Ivie's February 11, 2016, sentencing hearing. Ivie's motion was timely relative to the February 11, 2016, hearing, as it was within the 120 days allowed under I.C.R. 35. Ivie bases his motion on "a plea for leniency." *Id.,* p. 2. No additional basis was given. Ivie asks the Court to:

> …reconsider the psychosexual evaluation in his case in light of the fact that the polygraph was not requested by Dr. Wert and was not based upon any questions approved by Dr. Wert. Moreover, there was no narrative attached to the polygraph. Mr. Ivie further requests that the Court consider that the comparable sentences imposed were based upon offenders with a prior record, and were not necessarily applicable to him. Moreover, Defendant requests that the Court consider that the sentence was excessive in comparison to other defendants with similar convictions and criminal histories.

Id. In his Rule 35 Motion, counsel for Ivie requested a hearing. *Id.,* 2. On January 3, 2017, counsel for Ivie filed a Notice of Hearing, scheduling the hearing for January 30, 2017.

II. ANALYSIS.

For a variety of reasons this Court has determined that Ivie's Rule 35 Motion must be denied. The Court also determines that a hearing is not necessary.

A. IVIE'S MOTION IS TIME BARRED BECAUSE HE UNREASONABLY DELAYED IN BRINGING IT TO A HEARING.

Additionally, this Court finds the hearing now scheduled for January 30, 2017, is not reasonably timely. More than seven months have passed from the time Ivie's Rule 35 Motion was filed on June 8, 2016, to the time now set for hearing on January 30, 2017. The Court finds that delay to be unreasonable. The Idaho Court of Appeals discussed that issue in *State v. Torres,* 107 Idaho 895, 897-98, 693 P.2d 1097, 1099-1100 (Ct. App. 1984):

> The State further contends that even if Torres' motion was timely, the district court lost jurisdiction to rule on it after the 120-day period had expired. Again, we disagree. In the federal system, the 120-day time limit for filing Rule 35 motions is jurisdictional and may not be extended. *United*

> *States v. Addonizio,* 442 U.S. 178, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979). However, several federal courts have held that rulings on timely filed motions are not limited to the same 120-day period. The federal district courts are allowed to act on timely motions within a reasonable period after they are filed, even if that period extends beyond 120 days from judgment. *See United States v. Johnson*, 634 F.2d 94 (3rd Cir.1980); *United States v. Stollings,* 516 F.2d 1287 (4th Cir.1975); *United States v. Mendoza,* 565 F.2d 1285 (5th Cir.1978), modified 581 F.2d 89 (1978); *United States v. DeMier,* 671 F.2d 1200 (8th Cir.1982); *United States v. United States District Court*, 509 F.2d 1352 (9th Cir.1975), cert. denied sub nom. *Rosselli v. United States,* 421 U.S. 962, 95 S.Ct. 1949, 44 L.Ed.2d 448 (1975). Recently, the Ninth Circuit summarized the federal interpretation of Rule 35: "This court and other appellate courts have mitigated the arbitrary operation of the Rule by treating the time limit with some flexibility, allowing district courts to retain jurisdiction over timely-filed motions for a 'reasonable time' beyond the deadline." *United States v. Smith*, 650 F.2d 206, 209 (9th Cir.1981) (citations and footnote omitted).
>
> We are persuaded that this approach is better reasoned than the jurisdictional cutoff urged by the State. Therefore, we hold that a district court does not lose jurisdiction to act upon a timely motion under Rule 35 merely because the 120-day period expires before the judge reasonably can consider and act upon the motion. In this case the delay was caused in part by the retirement of the original sentencing judge. We will not visit the consequences of such delay upon Torres.

Ivie unreasonably delayed 162 days in bringing his Rule 35 Motion to issue by filing his Notice of Hearing. Accordingly, Ivie's Rule 35 Motion must be dismissed for that reason.

B. IVIE HAS NOT SET FORTH A VALID BASIS FOR HIS MOTION, NOR HAS IVIE SET FORTH ANY EVIDENCE TO SUPPORT HIS MOTION.

Where a sentence as originally imposed is not illegal, the defendant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown,* 121 Idaho 385, 393, 825 P.2nd 482, 490 (1992). "To establish that the sentence imposed was improper, the defendant must show that in light of the governing criteria, [the] sentence was excessive under any reasonable view of the facts." *Id.* (quoting *State v. Broadhead,* 120 Idaho 141, 143-45, 814 P.2d 401, 403-05 (1991) (citations omitted)). When a defendant does not identify what evidence he might have produced at a hearing that could not have been produced through affidavits, the district court does not abuse its

discretion in refusing to hold a hearing on his Rule 35 motion. *State v. Ramirez*, 122 Idaho 830, 836, 839 P.2d 1244, 1250 (Ct. App.1992). Specifically, the Idaho Court of Appeals held:

> This Court has previously held that while a defendant is entitled to be present at sentencing and at resentencing when a prior invalid sentence is corrected, no such right exists on a motion to reduce a sentence. *State v. James,* 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App.1986). "Indeed, the decision whether even to conduct a hearing on a Rule 35 motion has always been discretionary with the district court." *Id.* A trial court abuses its discretion on whether to hold a hearing on a Rule 35 motion when it unduly limits information considered in deciding the motion. *James,* 112 Idaho at 242, 731 P.2d at 237. Ramirez has failed to show that the district court unduly limited the available information in this case. Ramirez does not even identify what evidence he might have produced at a hearing that he was unable to produce through the affidavits which were submitted.

Id. (footnote omitted). Here, counsel for Ivie has failed to set forth evidence that could be adduced at present. Essentially, Ivie now wants even more time to have the *opportunity* to go out and obtain an additional polygraph. Counsel for Ivie now claims, "Therefore, Mr. Ivie first argues that the Court should allow him the opportunity to present a valid psycho-sexual evaluation, if possible." Memorandum in Support of Idaho Criminal Rule 35 Motion, 4. There is nothing in the past seven months that would have precluded Ivie from obtaining an additional polygraph and having it ready to present to the Court as part of his evidence for his I.C.R. 35 Motion. Ivie has not chosen to do that. Essentially, Ivie has instead chosen to file an I.C.R. 35 Motion, but then he also chose to untimely notice it up for hearing, and even with that delay in bringing it to hearing, Ivie merely asks for even more time to go out and obtain what Ivie failed to obtain at sentencing and what Ivie has failed to obtain in the interim seven months.

Next Ivie claims:

> Mr. Ivie's second argument is that his sentence was excessive in comparison to others similarly convicted. Mr. Ivie received the maximum sentence for a first time, one count felony conviction. There was no

> evidence presented to the Court that Mr. Ivie is a persistent offender. Moreover, the Pre-Sentence Investigation Report made erroneous comparisons of sentencing guidelines based upon similar Defendants. On page 13, the Presentence Investigation Report under "Sentencing Database Information" compared Mr. Ivie with other felons with Lewd Conduct convictions with "one prior conviction." This was erroneous comparison because Mr. Ivie did not have a prior conviction.

Memorandum in Support of Idaho Criminal Rule 35 Motion, 5. Ivie is simply wrong in making this argument. Ivie, according to his Presentence Report (which he was given opportunity to correct at sentencing and to which he made no correction to his prior record) was convicted on September 7, 2005, of misdemeanor Battery. Presentence Report, 3. Thus, Ivie in fact had a prior conviction. There are no facts which support Ivie's argument on his I.C.R. 35 Motion.

A motion to reduce sentence is a motion for leniency. *State v. Strand,* 137 Idaho 457, 463, 50 P.3d 472, 478 (2002); *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). The decision to grant or deny leniency is left to the sound discretion of the court. *Strand,* 137 Idaho at 463, 50 P.3d at 478. *State v. Allbee,* 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989).

> A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. *State v. Arambula,* 97 Idaho 627, 550 P.2d 130 (1976). Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe. *State v. Lopez.* 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984). . . .
>
> However, if the sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion.

State v. Forde, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *see also State v. Adams,* 137 Idaho 275, 278, 47 P.3d 778, 781 (Ct. App. 2002).

For a sentence to be considered "reasonable" at the time of sentencing the court must consider the objectives of sentencing: whether confinement is necessary to accomplish the objective of protection of society and to achieve any or all of the related

goals of deterrence, rehabilitation, or retribution applicable to the case. *State v. Toohill,* 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). This requires the court focus on "the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Reinke,* 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982).

The Court finds Ivie's sentence imposed on February 11, 2016, was reasonable. On the date of sentencing, the Court, through the Presentence Report, was aware of the following. That Ivie had a prior misdemeanor battery conviction. That Ivie had pled guilty to lewd conduct with a minor, and admitted having sex with his 13 year-old neice, while he was drunk. Presentence Report, 3. "I had drank a lot of Alcohol/black velvet earlier & was not feeling well so I went and layed [sic] in the living room. The next thing I knew we were having sex on the couch & she was on top of me." *Id.* Such a claim is incredible and the Court told Ivie that at sentencing. The impact on the child victim is profound. Ivie showed no remorse at sentencing, and Ivie's current counsel's claims to the contrary in the I.C.R. 35 Motion to the contrary are without merit. Ivie claimed at his sentencing hearing that this event was due to a nymphomaniac teenager. This Court remains entirely un-persuaded by such a claim. The victim was a 13-year old niece. Ivie's claim as to how the intercourse occurred are unbelievable. Ivie was much more focused at sentencing as to how this crime affected him, and only him. The Court stands by its remarks at the conclusion of the sentencing hearing that "You allowed your 13 year old relative to smoke your dope and then you had sex with her."

The sentence imposed on February 11, 2016, was and is an appropriate sentence given Ivie's social and criminal history and the crimes for which sentence was imposed. A lesser sentence would depreciate the seriousness of Ivie's crimes. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Ivie and others.

C. NO HEARING IS NEEDED.

A motion to modify a sentence "shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion." I.C.R. 35; *see State v. Copenhaver,* 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James,* 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App. 1986) (it is the defendant's burden to present any additional evidence and the court cannot abuse its discretion in "…unduly limiting the information considered in deciding a Rule 35 motion"); *State v. Puga,* 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct. App. 1987). Even though a hearing was requested, "[t]he decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally-imposed sentence is directed to the sound discretion of the district court." *State v. Peterson,* 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct. App. 1994) (*citing State v. Findeisen,* 119 Idaho 903, 811 P.2d 513 (Ct. App. 1991)). The Court has reviewed the Motion Pursuant to I.C.R. 35, the Court minutes, and the pre-sentence report. There is nothing that could be presented at a hearing that would be of benefit to the Court. A hearing would only waste counsel and the Court's time.

III. ORDER.

IT IS THEREFORE ORDERED that Ivie's I.C.R. 35 Motion is **DENIED.**

IT IS FURTHER ORDERED the hearing scheduled for January 30, 2017, is **VACATED.**

NOTICE OF RIGHT TO APPEAL

YOU, REGINALD JAMES IVIE, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an

appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer, if any.

DATED this 25th day of January, 2017.

_____
John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of January, 2017 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Monica Flood Brennan
Prosecuting Attorney – Barry McHugh

REGINALD JAMES IVIE
IDOC # 118371

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy